

2004

# State of Utah v. Robert Carl Terry : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	Case No. 20040326-CA
Plaintiff / Appellee,	)	
	)	*****
v.	)	ORAL ARGUMENT
	)	AND
ROBERT CARL TERRY,	)	PUBLISHED OPINION REQUESTED
	)	*****
Defendant / Appellant.	)	

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BRIEF OF APPELLANT

---

Appeal from the Second Amended Judgment and Commitment to the Utah State Prison signed by the district court on February 25, 2004, but entered on February 24, 2004, in the Second District Court in and for Davis County, the Honorable Judge Glen R. Dawson, presiding.

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IN THE UTAH COURT OF APPEALS

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Plaintiff / Appellee,	)	
	)	
v.	)	
	)	
ROBERT CARL TERRY,	)	
	)	
Defendant / Appellant.	)	

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AMENDED CERTIFICATE OF SERVICE

---

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the **BRIEF OF APPELLANT** to the following on this 13th day of July, 2005:

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**CERTIFICATE OF SERVICE**

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copy of the foregoing **AMENDED CERTIFICATE OF SERVICE** to the following on this 13th day of July, 2005:

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### STATEMENT OF JURISDICTION

The Utah Supreme Court, pursuant to Utah Code Ann. § 78-2-2(4) (2002), transferred this appeal to the Utah Court of Appeals. Consequently, the Utah Court of Appeals is conferred with jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002).

### STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether trial counsel denied Mr. Terry of the Sixth Amendment right to the effective assistance of counsel by failing to request jury instructions on the lesser included offenses of possession of controlled substance precursors and attempt. To make such a showing, a defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). The appellate court reviews such a claim as a matter of law. *State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376; *State v. Smith*, 2003 UT App 52, ¶12, 65 P.3d 648, cert. granted, 76 P.3d 691 (Utah 2003).

Mr. Terry also asserts this issue by way of plain error. In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), the Utah Supreme Court

outlined the following principles involved in determining whether "plain error" exists:

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

*Id.* at 1208-09; see also *State v. Roth*, 2001 UT 103, ¶5, 37 P.3d 1099 (citing *State v. Helmick*, 2000 UT 70, ¶9, 9 P.3d 164).

#### Preservation of Issue or Statement of Grounds for Review

Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule inasmuch as such claims may be raised for the first time on appeal. This issue is also being raised for the first time on appeal by way of plain error, which likewise constitutes an exception to the preservation rule.

2. Whether trial counsel rendered ineffective assistance of counsel and the trial court committed plain error by failing to accurately instruct the jury concerning the law and elements of the charges. To prove ineffective assistance of counsel, a defendant must first show that counsel rendered a deficient performance that fell below an objective standard of reasonable

professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). Such a claim is reviewed as a matter of law. *State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376; *State v. Smith*, 2003 UT App 52, ¶12, 65 P.3d 648, *cert. granted*, 76 P.3d 691 (Utah 2003).

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In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

*Id.* at 1208-09; see also *State v. Roth*, 2001 UT 103, ¶5, 37 P.3d 1099 (citing *State v. Helmick*, 2000 UT 70, ¶9, 9 P.3d 164).

*Preservation of Issue Citation or Statement of Grounds for Review:*

Issues involving claims of ineffective assistance of counsel and plain error constitute exceptions to the preservation rule and therefore may be raised for the first time on appeal.

### **DETERMINATIVE AUTHORITY**

The constitutional provisions, statutes, ordinances, rules, regulations, or case law, whose interpretation is determinative, are set out verbatim or by copy, with the appropriate citation, in the body and arguments or addenda of the instant Brief of Appellant.

### **STATEMENT OF THE CASE**

This case involves critical questions concerning, among other critical matters, the failure to request jury instructions on the lesser included offenses of possession of controlled substance precursors and an attempt to commit the charged crimes or the lesser included offenses. In this case, trial counsel failed to request jury instructions and the trial court failed to provide instructions that would have provided a rational basis for the jury to convict Defendant of the lesser included offenses.

Defendant was charged with two counts of Clandestine Laboratory Precursors and/or Equipment (Counts 1 and 2), both first-degree felonies, one count of Failure to Respond to Officer's Signal to Stop (Count 3), a third-degree felony, and one count of Carrying a Concealed Dangerous Weapon (Count 4), a class B misdemeanor. Defendant pleaded not guilty to all the charges.

On November 13, 2001, the parties appeared for a jury trial. The jury found Defendant guilty of all charges.

Defense counsel subsequently filed various motions, which the trial court denied. On September 9, 2002, the trial court sentenced Defendant to an indeterminate term of five years to life on Counts 1 and 2, an indeterminate term of zero to five years on Count 3, and six months in the Davis County Jail on Count 4, to be served concurrently. Defense counsel filed a Motion for New Trial On September 23, 2002, to which the State responded in opposition. The trial court denied the Motion for New Trial on February 25, 2003.

On September 15, 2003, Defendant, acting pro se, filed a Rule 65B Motion for Resentencing, requesting nunc pro tunc resentencing due to his counsel's failure to perfect an appeal. The trial court, on February 24, 2004, granted the Motion and resentenced Defendant, imposing the same sentence previously imposed on September 9, 2002. Defendant filed a pro se Notice of Appeal on March 23, 2004.

On May 19, 2004, the Utah Supreme Court transferred the appeal to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4). Pursuant to Defendant's request, the trial court appointed the undersigned as appellate counsel for purposes of the appeal.



### STATEMENT OF FACTS

1. Mr. Terry was charged with two counts of Clandestine Laboratory Precursors and/or Equipment (Counts 1 and 2), both first-degree felonies, in violation of Utah Code Ann. §§ 58-37d-4 and 58-37d-5, one count of Failure to Respond to Officer's Signal to Stop (Count 3), a third-degree felony, in violation of Utah Code Ann. § 41-6-13.5, and one count of Carrying a Concealed Dangerous Weapon (Count 4), a class B misdemeanor, in violation of Utah Code Ann. § 76-10-504(1) (R. 68-70). See Information / Complaint for Forfeiture, R. 68-70, a true and correct copy of which is attached hereto as Addendum A.

2. Mr. Terry pleaded not guilty to all charges (R. 48-49).

3. The parties appeared for a jury trial on November 13, 2001 (R. 115-19).

4. After deliberating, the jury found Mr. Terry guilty on all charges (R. 601:254:13-19).

5. On April 11, 2002, defense counsel filed a Motion to Dismiss or for New Trial (R. 171-83).

6. On May 8, 2002, the State filed a memorandum in opposition to Mr. Terry's Motion (R. 188-229).

7. After taking the matter under advisement, the trial court ruled, among other things, that the Motion for a new trial was untimely (R. 242-44).

8. On June 28, 2002, defense counsel asserted essentially the same theories previously raised in the form of a Motion for Arrest of Judgment (R. 255-66).

9. The State again responded in opposition (R. 270-73).

10. On August 27, 2002, the trial court issued its Ruling on Defendant's Motion for Arrest of Judgment, denying the Motion for Arrest of Judgment (R. 292-309).

11. On September 9, 2002, the trial court sentenced Mr. Terry to an indeterminate term of five years to life on Counts 1 and 2, an indeterminate term of zero to five years on Count 3, and six months in the Davis County Jail on Count 4, to be served concurrently (R. 331; R. 347-49).

12. On September 23, 2002, defense counsel filed a Motion for New Trial (R. 354-55).

13. The State responded in opposition (R. 359-404).

14. On February 25, 2003, the trial court denied the Motion for New Trial (R. 515-16).

15. On September 15, 2003, Mr. Terry, pro se, filed Defendant's Rule 65B Motion for Resentencing, requesting nunc pro tunc resentencing due to his counsel's failure to perfect an appeal (R. 521-34).

16. The State opposed Mr. Terry's Rule 65B Motion (R. 542-44).

17. On February 24, 2004, the trial court held a hearing on the Rule 65B Motion for Resentencing (R. 558). During that hearing, the State agreed to a resentencing to begin the appeal time running again (R. 559).

18. That same day, the trial court resentenced Mr. Terry, imposing the same sentence previously imposed on September 9, 2002 (R. 560). See Second Amended Judgment and Commitment to the Utah State Prison, R. 560, a true and correct copy of which is attached hereto as Addendum B.

19. On March 23, 2004, Mr. Terry filed a pro se Notice of Appeal (R. 565-67). See Notice of Appeal, R. 565-67, a true and correct copy of which is attached hereto as Addendum C.

20. On May 19, 2004, the Utah Supreme Court transferred the appeal to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4).

21. Pursuant to the request of Mr. Terry, the trial court appointed the undersigned as appellate counsel for purposes of the appeal (R. 591-92).

#### **SUMMARY OF ARGUMENTS**

1. Trial counsel denied Mr. Terry of the Sixth Amendment right to the effective assistance of counsel by failing to request jury instructions on the lesser included offenses of possession of

controlled substance precursors, including the attempt to commit the charged crimes. In this case, not only is there is a close relationship between the enhanced crime of clandestine laboratory precursors and/or equipment and possession of controlled substance precursors, but there also is significant overlap in the elements of each offense.

Further, the evidence presented during trial provided a rational basis for the jury to acquit Mr. Terry of the enhanced crime of clandestine laboratory precursors and/or equipment and then convict him of a lesser included offense of possession of a controlled substance precursor had those particular instructions been given. The jury could have rationally found under the circumstances of this case that Mr. Terry merely possessed, if that, the controlled substance precursors of iodine and/or pseudoephedrine.

Trial counsel also failed to request a jury instruction concerning the attempt of Mr. Terry to commit the crime of either the enhanced crime of clandestine laboratory precursors and/or equipment and possession of controlled substance precursors. Under the facts of this case, the jury could have rationally found that Mr. Terry's alleged solicitation of Mr. Archibald to purchase the controlled substance precursors actually constituted an attempt.

Trial counsel's failure to request jury instructions on the lesser included offenses of possession of controlled substance precursors and the attempt to commit the alleged crimes fell below an objective standard of reasonable professional judgment. But for counsel's deficient performance of failing to request a lesser included offense instruction, Mr. Terry would not have been convicted of the enhanced crime of clandestine laboratory precursors and/or equipment.

Additionally, the trial court plainly erred by failing to charge the jury with respect to the previously discussed lesser included offenses. The record demonstrates that there is a rational basis in the instant case for a verdict acquitting Mr. Terry of the enhanced crime of clandestine laboratory precursors and/or equipment and then convicting him of a lesser included offense of possession of a controlled substance precursor.

2. Trial counsel rendered ineffective assistance of counsel and the trial court committed plain error by failing to accurately instruct the jury concerning the law and elements of the charges. The failure of trial counsel to object to the constructive possession instruction fell below an objective standard of reasonable professional judgment in light of existing Utah case law and the underlying factual circumstances of this case. But for counsel's deficient performance, Mr. Terry would not have been

convicted of the enhanced crime of clandestine laboratory precursors and/or equipment.

The trial court committed plain error by failing to accurately instruct the jury on the law of constructive possession as it applied to the facts of the case. Further, the error concerning constructive possession should have been obvious in light of prior Utah case law and rules concerning a trial court's duty to accurately instruct the jury and a defendant's right to have his theory of the case presented to the jury in a clear and understandable way. Finally, the error that resulted was harmful because it precluded the jury from duly and accurately considering the law as it pertained to the underlying facts of the case.

Trial counsel also failed to request a jury instruction that accurately defined the conspiracy element. Moreover, trial counsel failed to request that a special verdict form be utilized by the jury so that Mr. Terry could determine the variation relied upon by the jury to convict him of Clandestine Laboratory Precursors and/or Equipment. Trial counsel's failures fell below an objective standard of reasonable professional judgment, which is demonstrated by existing Utah case law, statutory criteria, and the underlying factual circumstances of this case. But for counsel's deficient performance, the outcome would have been different inasmuch as Mr. Terry would not have been convicted of

the enhanced crime of clandestine laboratory precursors and/or equipment, as a first-degree felony.

Additionally, the trial court plainly erred by failing to accurately instruct the jury concerning conspiracy as an element of the crimes charged, which was obvious in light of prior Utah case law, statutory criteria, and rules concerning a trial court's duty to accurately instruct the jury on the applicable law. This error was harmful because it precluded the jury from duly and accurately considering the law as it pertained to the facts of the case as well as requiring the jury to disclose the variation relied upon in the course of convicting Mr. Terry.

The failure of trial counsel to object to the proposed jury instructions as an incomplete and thereby inaccurate statement of the element of intent fell below an objective standard of reasonable professional judgment. This is demonstrated by Utah case law, Utah Code Ann. § 58-37d-6, and the underlying factual circumstances of the case. But for counsel's deficient performance, the outcome would have been different inasmuch as Mr. Terry would not have been convicted of the enhanced crime of clandestine laboratory precursors and/or equipment.

The trial court committed plain error by failing to completely and accurately instruct the jury on the law applicable to the legal element of intent as it pertained to Counts I and II

of the Information. This error was obvious in light Utah case law and rules concerning a trial court's duty. The resulting error was harmful because it precluded the jury from completely and accurately considering all the elements of the charges set forth in Count I and II of the Information.

### **ARGUMENTS**

#### **I. TRIAL COUNSEL DENIED MR. TERRY OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST JURY INSTRUCTIONS ON THE LESSER INCLUDED OFFENSES OF POSSESSION OF A CONTROLLED SUBSTANCE PRECURSOR.**

##### **A. *Ineffective Assistance of Counsel***

The United States Supreme Court, in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), established a two-prong test for determining when a defendant's Sixth Amendment<sup>1</sup> right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. This test - adopted by Utah courts - requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant."

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<sup>1</sup>The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."



*Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); accord *State v. Templin*, 805 P.2d 182, 186 (Utah 1990); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986); *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

To satisfy the first prong of the test, a defendant must "identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *Templin*, 805 P.2d at 186 (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), cert. denied, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."

*Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994); *Frame*, 723 P.2d at 405. In the course of this determination, the appellate court "should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *Templin*, 805 P.2d at 187.

**B. Lesser Included Offenses Instructions**

Trial counsel's failure to request jury instructions on the lesser included offenses of possession of a controlled substance precursor as set forth in Utah Code Ann. §§ 58-37c-3(12)(k), 58-37c-19(2), and 58-37c-20(1) fell below an objective standard of reasonable professional judgment. This is demonstrated by existing Utah case law, the plain language of Utah Code Ann. § 76-1-402(3) and (4), and the underlying factual circumstances of this case.

According to *State v. Baker*, 671 P.2d 152 (Utah 1983), and subsequent case law,<sup>2</sup> a lesser included offense instruction must

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<sup>2</sup>The subsequent cases include *State v. Smith*, 700 P.2d 1106 (Utah 1985); *State v. Brown*, 694 P.2d 587 (Utah 1984); *State v. Oldroyd*, 685 P.2d 551 (Utah 1984); *State v. Shabata*, 678 P.2d 785 (Utah 1984);

be given if (1) the statutory elements of greater and lesser included offenses overlap to some degree, and (2) the evidence provides a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." See *id.* at 159 (quoting Utah Code Ann. § 76-1-402(4)); see also *State v. Kell*, 2002 UT 106, ¶23, 61 P.3d 1019; *State v. Evans*, 2001 UT 22, ¶18, 20 P.3d 888; *State v. Hansen*, 734 P.2d 421, 424 (Utah 1986). In the course of making this determination, the court must view the facts in a light most favorable to the defendant. *State v. Velarde*, 734 P.2d 449, 453 (Utah 1986); see also *State v. Spillers*, 2005 UT App 283, ¶13. Furthermore, "[t]he requirements . . . for the inclusion of a lesser included offense instruction requested by the defendant should be liberally construed." *Hansen*, 734 P.2d at 424.

The elements of the enhanced crime of clandestine laboratory precursors and/or equipment, the crime with which Mr. Terry was charged and convicted, are contained in Utah Code Ann. §§ 58-37d-4(1)(a) and 58-37d-5(1)(a),<sup>3</sup> which state as follows:

It is unlawful for any person to knowingly or intentionally . . . possess a controlled substance precursor with the

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*State v. Bales*, 675 P.2d 573 (Utah 1983); and *State v. Crick*, 675 P.2d 527 (Utah 1983).

<sup>3</sup>A copy of Utah Code Ann. §§ 58-37d-4 (2002) and 58-37d-5 (2002) are attached hereto as Addendum D.

intent to engage in a clandestine laboratory operation;

A person who violates Subsection 58-37d-4(1)(a) . . . is guilty of a first degree felony if the trier of fact also finds any one of the following conditions occurred in conjunction with that violation:

- (a) possession of a firearm; . . . .
- (e) conspire with or aid another to engage in a clandestine laboratory operation . . . .<sup>4</sup>

The elements of possession of a controlled substance precursor are alternatively set forth at Utah Code Ann. §§ 58-37c-3(12)(k), 58-37c-19(2), and 58-37c-20(1),<sup>5</sup> which state:

"Unlawful conduct" as defined in Section 58-1-501 includes knowingly and intentionally . . . obtaining or attempting to obtain or to possess any controlled substance precursor or any combination of controlled substance precursors knowing or having a reasonable cause to believe that the controlled substance precursor is intended to be used in the unlawful manufacture of any controlled substance.<sup>6</sup>

\* \* \* \*

Any person who is not licensed to engage in regulated transactions and not excepted from licensure is guilty of a class A misdemeanor who, under circumstances not

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<sup>4</sup>Without the possession-of-firearm condition, the charge of possession of a controlled substance precursor is a second-degree felony. See Utah Code Ann. § 58-37d-4(2) (2002).

<sup>5</sup>A copy of Utah Code Ann. §§ 58-37c-3(12) (2002), 58-37c-19 (2002), and 58-37c-20 (2002) is attached hereto as Addendum E.

<sup>6</sup>A violation of Utah Code Ann. § 58-37c-3(12)(k) is a second-degree felony. See Utah Code Ann. § 58-37c-11(2) (2002).

amounting to a violation of Subsection 58-37c-3(12)(k) or Subsection 58-37d-4(1)(a):

- (a) possesses more than two ounces of crystal iodine; or
- (b) offers to sell, sells, or distributes crystal iodine to another.

\* \* \* \*

Any person who is not licensed to engage in regulated transactions and not excepted from licensure who, under circumstances not amounting to a violation of Subsection 58-37c-3(12)(k) or Subsection 58-37d-4(1)(a), possesses more than 12 grams of ephedrine or pseudoephedrine, their salts, isomers, or salts of isomers, or a combination of any of these substances, is guilty of a class A misdemeanor.

According to *Baker*, an offense is included in a greater offense when there is "some relationship" between them and "some overlap" in the proof that is required to establish the elements of both offenses. See *State v. Pitts*, 728 P.2d 117, 116 (Utah 1986) (citing *State v. Hill*, 674 P.2d 96 (Utah 1983)). In this case, not only is there is a close relationship between the enhanced crime of clandestine laboratory precursors and/or equipment and possession of controlled substance precursors, but there also is significant overlap in the elements of each offense.

Further, the second part of the *Baker* test is satisfied in the instant case. The evidence presented during trial provided a rational basis for the jury to acquit Mr. Terry of the enhanced

crime of clandestine laboratory precursors and/or equipment and then convict him of a lesser included offense of possession of a controlled substance precursor had those particular instructions been given (R. 601:24-35; R. 601:82-92; R. 601:115-30). On the facts before it, the jury could have rationally found under the circumstances of this case that Mr. Terry, at best, merely possessed the controlled substance precursors of iodine and/or pseudoephedrine (*See id.*). Cf. *State v. Hopkins*, 1999 UT 98, ¶27, 989 P.2d 1065.

Trial counsel likewise failed to request a jury instruction concerning the attempt of Mr. Terry to commit the crime of either the enhanced crime of clandestine laboratory precursors and/or equipment and possession of controlled substance precursors. According to Utah law, "a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense." See Utah Code Ann. § 76-4-101(1) (2002). Under the facts of the instant case, the jury could have rationally found that Mr. Terry's alleged solicitation of Mr. Archibald to purchase the controlled substance precursors actually constituted an attempt.<sup>7</sup>

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<sup>7</sup>According to Utah Code Ann. § 76-4-102 (2002), a criminal attempt to commit a crime results in a one-step reduction of the charged crime. See Utah Code Ann. § 76-4-102(2) and (5).

Trial counsel's failure to request jury instructions on the lesser included offenses of possession of controlled substance precursors and the attempt to commit the alleged crimes fell below an objective standard of reasonable professional judgment in light of existing Utah case law, the plain language of Utah Code Ann. §§ 76-1-402(3) and (4), Utah Code Ann. § 76-4-101, and the underlying factual circumstances of this case. But for counsel's deficient performance of failing to request a lesser included offense instruction, Mr. Terry would not have been convicted of the enhanced crime of clandestine laboratory precursors and/or equipment.

### **C. Plain Error**

In addition to ineffective assistance of counsel, the trial court committed plain error by failing to charge the jury with respect to the aforementioned lesser included offenses. The Utah Supreme Court, in *State v. Dunn*, 850 P.2d 1201 (Utah 1993), outlined the following principles involved in determining whether "plain error" exists:

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for

the appellant, or phrased differently, our confidence in the verdict is undermined.

*Id.* at 1208-09; *see also State v. Roth*, 2001 UT 103, ¶5, 37 P.3d 1099 (citing *State v. Helmick*, 2000 UT 70, ¶9, 9 P.3d 164); *State v. Portillo*, 914 P.2d 724, 726 (Utah Ct. App. 1996); and *State v. Tenney*, 913 P.2d 750 (Utah Ct. App. 1996).

The trial court plainly erred by failing to charge the jury with respect to the previously discussed lesser included offenses. According to Utah Code Ann. § 76-1-402(4) (2002), the trial court is not "obligated to charge the jury with respect to an included offense *unless* there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." (Emphasis added).

There is a rational basis in the instant case for a verdict acquitting Mr. Terry of the enhanced crime of possession of clandestine laboratory precursors and/or equipment and then convicting him of a lesser included offense of possession of a controlled substance precursor. The record demonstrates that Mr. Terry was neither in actual nor constructive possession of the controlled substance precursors (R. 601::24-35; R. 601:82-92; R. 601:115-30). Moreover, Mr. Terry was never in possession of any clandestine drug lab equipment (R. 601:204-18; *cf.* Utah Code Ann. § 58-37d-6 (2002)).



This error should have been obvious in light of prior case law, statutory language, and various rules concerning a trial court's obligation and a defendant's right to a lesser-included-offense charge when such a rational basis exists. Moreover, the resulting error was harmful because it precluded the jury from duly considering the lesser included offenses.

**II. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE  
OF COUNSEL AND THE TRIAL COURT COMMITTED  
PLAIN ERROR BY FAILING TO ACCURATELY INSTRUCT  
THE JURY CONCERNING THE LAW AND ELEMENTS OF  
THE CHARGES.**

Mr. Terry incorporates the statements of the law and legal citations pertaining to the Sixth Amendment right to effective assistance of counsel previously set forth in Argument I. In addition, Mr. Terry incorporates the statements of law and legal citations pertaining to plain error, which are also set forth in Argument I.

As a matter of well-settled law, no person accused of a crime in this country may be convicted of a crime unless each element of the offense has been proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068 (1970). Utah law requires the jury to be instructed with respect to all the legal elements that it must find to convict a defendant of the crime so charged. *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991). The

absence of such an instruction is reversible error as a matter of law. *Id.* (citing *State v. Laine*, 618 P.2d 33, 35 (Utah 1980)). "The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985) (citing *Laine*, 618 P.2d at 35); see also *State v. Harmon*, 712 P.2d 291, 292 (Utah 1986) (per curiam); *State v. Reedy*, 681 P.2d 1251, 1252 (Utah 1984). "Thus, the failure to give this instruction can never be harmless error." *Jones*, 823 P.2d at 1061.

#### **A. Constructive Possession Instruction**

Trial counsel rendered ineffective assistance of counsel by failing to object to Instruction No. 33,<sup>8</sup> which was utilized to instruct the jury concerning constructive possession. According to Utah law, to prove constructive possession there must be a "sufficient nexus" between the accused and the controlled substance precursors to permit an inference that the accused had both the power and the intent to exercise dominion and control over the controlled substance precursors. See *State v. Layman*, 1999 UT 79, ¶13, 985 P.2d 911 (citing *State v. Fox*, 709 P.2d 316, 319 (Utah 1985)). In other words, to show constructive possession

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<sup>8</sup>A true and correct copy of Jury Instruction No. 33 (R. 100) is attached hereto as Addendum F.

in the instant case, the State had to prove beyond a reasonable doubt that the controlled substance precursors "were subject to the defendant's dominion and control and the defendant had the intent to exercise that control." *Id.* at ¶16 (citing *Fox*, 709 P.2d at 318).

According to the evidence presented in the instant case, no one but the police took possession, either actual or constructive, of the controlled substance precursors (R. 601:37-38; R. 601:129-30). Indisputably, the police in the instant case at all relevant times had direct custody, dominion, and control of the controlled substance precursors over which Mr. Terry allegedly had constructive possession. Consequently, the State, as a matter of impossibility, could not have proven that Mr. Terry constructively possessed the controlled substance precursors. At the very most, the factual circumstances of the case constituted an alleged constructive possession or an alleged conspiracy to possess the controlled substance precursors.

The failure of trial counsel to object to Instruction No. 33 fell below an objective standard of reasonable professional judgment in light of existing Utah case law and the underlying factual circumstances of this case.<sup>9</sup> But for counsel's deficient performance, the outcome would have been different in that Mr.

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<sup>9</sup>See Utah R. Crim. P. 19(e).

Terry would not have been convicted of the enhanced crime of clandestine laboratory precursors and/or equipment.

"A trial court has a duty to instruct the jury on the law applicable to the facts of the case." See *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992) (citing *State v. Potter*, 627 P.2d 75, 78 (Utah 1981)).<sup>10</sup> Based upon established principles of plain error, the trial court committed plain error by failing to accurately instruct the jury on the law applicable to the facts of the case.

The error concerning constructive possession should have been obvious in light of prior Utah case law and rules concerning a trial court's duty and a defendant's right "to have his theory of the case presented to the jury in a clear and understandable way." *Potter*, 627 P.2d at 78. Further, the error that resulted was harmful because it precluded the jury from duly and accurately considering the law as it pertained to the underlying facts of the case.

#### **B. Conspiracy Instruction**

For the jury to convict Mr. Terry of Clandestine Laboratory Precursors and/or Equipment as set forth in Counts I and II of the Information, the jury had to find that the State had proved beyond a reasonable doubt that Mr. Terry "[k]nowingly or intentionally; . . . [p]ossessed a controlled substance precursor with the intent

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<sup>10</sup>See Utah R. Crim. P. 19(a).

to engage in a clandestine laboratory operation; **AND/OR** . . . [c]onspired with or aided another to engage in a clandestine laboratory operation . . . ." (R. 92-94).<sup>11</sup> According to Utah Code Ann. § 76-4-201 (2002), "a person is guilty of conspiracy when he, intending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of the conduct and any one of them commits an overt act in pursuance of the conspiracy . . . ."

Trial counsel failed to request a jury instruction that accurately defined the conspiracy element as set forth in Utah Code Ann. § 76-4-201. Moreover, trial counsel failed to request that a special verdict form be utilized by the jury so that Mr. Terry, as the accused, could determine which variation the jury relied upon in the course of convicting him of Clandestine Laboratory Precursors and/or Equipment.

In *State v. Hopkins*, 1999 UT 98, 989 P.2d 1073, the State charged the defendant with unlawful clandestine laboratory operations, which included multiple variations of statutory criteria for conviction. *Id.* at ¶27. However, because no special verdict form was utilized, the Court determined that it was possible that the jury relied upon the subsection that includes

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<sup>11</sup>A true and correct copy of Jury Instructions Nos. 28 and 29 (R. 92-94) are attached hereto as Addendum G.

all the elements for conviction of possession of a controlled substance precursor as a lesser included offense. *Id.* Consequently, the Utah Supreme Court reversed the conviction for precursor possession. *See id.*

Trial counsel's failure to propose a jury instruction that accurately defined the conspiracy element and the failure to request that a special verdict form be utilized by the jury fell below an objective standard of reasonable professional judgment. This is demonstrated by existing Utah case law, statutory criteria, and the underlying factual circumstances of this case. But for counsel's deficient performance, the outcome would have been different inasmuch as Mr. Terry would not have been convicted of the enhanced crime of clandestine laboratory precursors and/or equipment as a first-degree felony. Had a special verdict form been requested and utilized, Mr. Terry would have been provided with notice of the variation relied upon by the jury in the course of convicting him under Counts I and II of the Information. In the event that the jury had relied upon the conspiracy variation, which would have been revealed by way of the special verdict form, the conviction would have been reduced to a second-degree felony or one classification pursuant to Utah Code Ann. § 76-4-202(2) (2002).

"A trial court has a duty to instruct the jury on the law applicable to the facts of the case." See *State v. Hamilton*, 827 P.2d 232, 238 (Utah 1992) (citing *State v. Potter*, 627 P.2d 75, 78 (Utah 1981)). Based upon established principles of plain error, the trial court plainly erred by failing to accurately instruct the jury on the law applicable to the facts of the case.

The error concerning conspiracy as an element of the crimes charged was obvious in light of prior Utah case law, statutory criteria, and rules concerning a trial court's duty to accurately instruct the jury on the applicable law. See *Potter*, 627 P.2d at 78. This error was harmful because it precluded the jury from duly and accurately considering the law as it pertained to the facts of the case as well as requiring the jury to disclose the variation relied upon in the course of arriving at the convictions.

### **C. Intent Instruction**

As previously discussed, before the jury could convict Mr. Terry of Clandestine Laboratory Precursors and/or Equipment as set forth in Counts I and II of the Information, it had to find that the State had proved beyond a reasonable doubt that Mr. Terry "[k]nowingly or intentionally; . . . [p]ossessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation; **AND/OR** . . . [c]onspired with or aided

another to engage in a clandestine laboratory operation . . . .”  
(R. 92-94). Utah Code Ann. § 58-37d-6 (2002) specifically designates the circumstances under which the jury, as the trier of fact, may infer that a defendant intended to engage in a clandestine laboratory operation. That provision states:

The trier of fact may infer that the defendant intended to engage in a clandestine laboratory operation if the defendant:

- (1) is in illegal possession of a controlled substance precursor; or
- (2) illegally possesses or attempts to illegally possess a controlled substance precursor and is in possession of any one of the following pieces of equipment:
  - (a) glass reaction vessel;
  - (b) separatory funnel;
  - (c) glass condenser;
  - (d) analytical balance; or
  - (e) heating mantle.

Utah Code Ann. § 58-37d-6 (2002).

The failure of trial counsel to object to the proposed jury instructions as an incomplete and thereby inaccurate statement of the elements and relevant law fell below an objective standard of reasonable professional judgment, which is demonstrated existing Utah case law, Utah Code Ann. § 58-37d-6, and the underlying factual circumstances of the case. But for counsel’s deficient performance, the outcome would have been different inasmuch as Mr. Terry would not have been convicted of the enhanced crime of clandestine laboratory precursors and/or equipment. This is



particularly applicable in light of the foregoing ineffective assistance of counsel and plain error arguments.

According to Utah law, the jury must be instructed as to all the legal elements that it must find to convict a defendant of the crime so charged -- the absence of which is reversible error. *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991) (citing *State v. Laine*, 618 P.2d 33, 35 (Utah 1980)); see also *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985) (stating that "[t]he general rule is that an accurate instruction upon the basic elements of an offense is essential."). The trial court plainly erred by failing to completely and accurately instruct the jury on the law applicable to the legal element of intent as it pertained to Counts I and II of the Information.

This error was obvious in light of the trial court's obligation to so instruct the jury, which is well-established by Utah case law and rules concerning a trial court's duty. The resulting error was harmful because it precluded the jury from completely and accurately considering all the elements of the charges set forth in Count I and II of the Information.

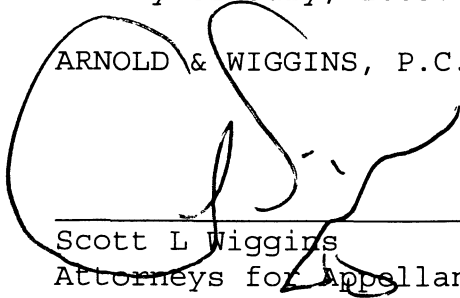
### **CONCLUSION**

Based on the foregoing, Mr. Terry respectfully requests that this Court reverse his convictions and remand the case to the

trial court for a new trial or, in the alternative, that this Court reverse Mr. Terry's convictions and enter judgment for the lesser included offenses together with any relief the Court deems just and appropriate under the circumstances of the case.

RESPECTFULLY SUBMITTED this 12th day of July, 2005.

ARNOLD & WIGGINS, P.C.

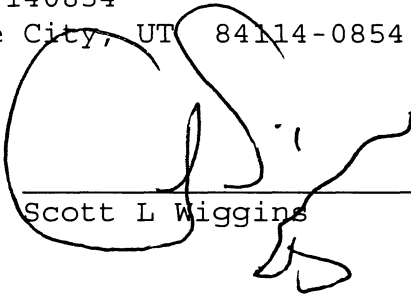


\_\_\_\_\_  
Scott L Wiggins  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 12th day of July, 2005:

Mr. J. Frederic Voros, Jr.  
Assistant Attorney General  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854



\_\_\_\_\_  
Scott L Wiggins

## **ADDENDA**

Addendum A: Information / Complaint for Forfeiture  
Addendum B: Second Amended Judgment and Commitment to  
the Utah State Prison  
Addendum C: Notice of Appeal  
Addendum D: Utah Code Ann. §§ 58-37d-4 (2002) and 58-  
37d-5 (2002)  
Addendum E: Utah Code Ann. §§ 58-37c-3(12) (2002),  
58-37c-19 (2002), and 58-37c-20 (2002)  
Addendum F: Jury Instruction No. 33  
Addendum G: Jury Instructions Nos. 28 and 29

Exhibit A

MELVIN C. WILSON  
Davis County Attorney  
P. O. Box 618  
800 West State Street  
Farmington, Utah 84025  
Telephone: (801) 451-4300  
Fax: (801) 451-4328

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IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH  
FARMINGTON DEPARTMENT

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THE STATE OF UTAH,  
Plaintiff,  
vs.  
ROBERT CARL TERRY,  
DOB: 08/18/1959,  
Defendant.

Bail:

INFORMATION/COMPLAINT  
FOR FORFEITURE

Case No. 011700517 FS  
OTN 12259776

mcgA

The undersigned officer states on information and belief that the defendant, on or about March 21, 2001, at County of Davis, State of Utah, committed the crimes of:

COUNT 1

CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT (58-37d-4 and 58-37d-5), a first degree felony, as follows: That at the time and place aforesaid, the defendant, as a party, knowingly or intentionally (A) possessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation; (B) conspired with or aided another to engage in a clandestine laboratory operation; and in so doing possessed a firearm.

COUNT 2

CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT (58-37d-4 and 58-37d-5), a first degree felony, as follows: That at the time and place aforesaid, the defendant, as a party, knowingly or intentionally (A) possessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation; (B) conspired with or aided another to engage in a clandestine laboratory operation; and in so doing possessed a firearm.

### COUNT 3

FAILURE TO RESPOND TO OFFICER'S SIGNAL TO STOP (41-6-13.5), a third degree felony, as follows: That at the time and place aforesaid, the defendant did operate a motor vehicle and, having received a visual or audible signal from a peace officer to bring his vehicle to a stop, did operate his vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or did attempt to flee or elude a peace officer by vehicle or other means.

### COUNT 4

CARRYING A CONCEALED DANGEROUS WEAPON (76-10-504(1)), a class B misdemeanor, as follows: That at the time and place aforesaid, the defendant did carry a concealed dangerous weapon, (A) which was not a firearm on his person or one that was readily accessible for immediate use which is not securely encased, as defined in this part, in a place other than his residence, property, or business under his control; or (B) which was a firearm that contained no ammunition without a valid concealed firearm permit.

### COUNT 5

#### NOTICE OF SEIZURE AND NOTICE OF INTENT TO FORFEIT

NOTICE IS HEREBY GIVEN, pursuant to Utah Code Ann. 58-37-13, et seq., that the following property was seized on or about March 21, 2001, incident to an arrest of defendant, to wit: 1997 Chevy Camaro bearing VIN #2G1FP22P9V2152515 and license plate 10-MYSS registered to Robert Terry and Fourteen Thousand Four Dollars and 50/100 Dollars (\$14,004.50) in U.S. Currency.

NOTICE IS FURTHER GIVEN that the State of Utah intends to seek the forfeiture of the said seized 1997 Chevy Camaro bearing VIN #2G1FP22P9V2152515 and license plate 10-

MYSS registered to Robert Terry and Fourteen Thousand Four Dollars and 50/100 Dollars (\$14,004.50) in U.S. Currency, and to forfeit and confiscate any right, title or interest that defendant may claim to have in and to said property.

This information is based on evidence obtained from witness Jeff Jensen.

PROBABLE CAUSE STATEMENT: The undersigned officer has received information from the investigating officer, Jeff Jensen of the Davis Metro Narcotics Strike Force, and the Information herein is based upon such personal observations and investigation of said officer.

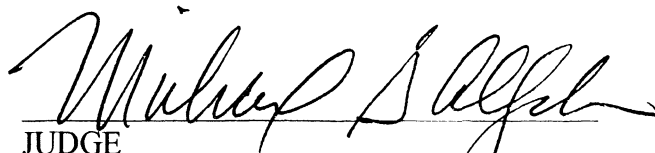
1. On March 22, 2001, defendant provided Jeffery Archibald \$11,800 in cash for the purchase of chemical precursors. Agents working for the Davis Metro Narcotics Strike Force, met with Mr. Archibald who then used the money to purchase 10 pounds of iodine and four cases of pseudoephedrine.

2. At the time of the above transaction, defendant was driving a 1997 Chevy Camaro. When officers attempted to stop defendant, he fled the area and a chase ensued

3. In addition to the \$11,800 that defendant used to purchase the above chemicals, \$2,204.50 in cash was found in defendant's possession. Because the 1997 Chevy Camaro and the cash could easily be disposed of, hidden or transported out of State, they were seized without a warrant.

  
Affiant

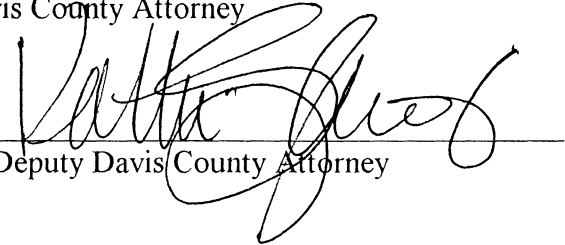
SUBSCRIBED AND SWORN to before me this 23<sup>rd</sup> day of March, 2001.

  
JUDGE



Authorized March 23, 2001,  
for presentment and filing:

MELVIN C. WILSON  
Davis County Attorney

By   
Deputy Davis County Attorney

A felony of the first degree carries a possible maximum penalty of five years to life imprisonment and/or up to \$10,000 fine. Conviction of a drug-related offense requires immediate suspension of defendant's drivers license for six months under Utah Code Annotated, 53-3-220(1)(c).

Exhibit B

**FILED**

FEB 24 2004

SECOND  
DISTRICT COURT

IN THE DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH  
FARMINGTON DEPARTMENT

STATE OF UTAH,

Plaintiff,

v.

ROBERT CARL TERRY,

Defendant.

**SECOND AMENDED JUDGMENT  
AND COMMITMENT TO THE UTAH  
STATE PRISON**

Case No. 011700517

That whereas said defendant, having been convicted at trial on Count 1 and 2 to the crimes of Clandestine Laboratory Precursors and/or Equipment (58-37d-4 and 58-37d-5), felonies of the 1<sup>st</sup> degree, Count 3 Fail to Stop/Respond at Command of Police Officer, a Felony of the 3<sup>rd</sup> degree, and Count 4 to Carrying Concealed Dangerous Weapon, a Class A Misdemeanor, and now being present in Court and now being present in Court accompanied by his attorney and ready for sentence, thereupon the Court renders its judgment.

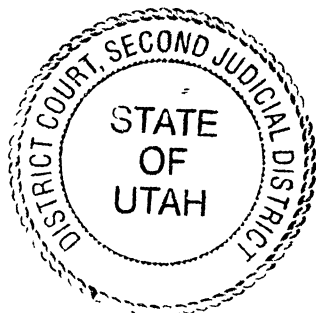
**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:**

The defendant is sentenced to the Utah State Prison on Counts 1 and 2 for an indeterminate term of 5 years to life in each count, Count 3 for an indeterminate term of 0-5 years, Count 4 to 6 months in the Davis County Jail, may be served at the Utah State Prison.

Court recommendations: The Court recommends that each count run concurrent with the other. Please notify Judges Michael G. Allphin, Glen R. Dawson, and Prosecutor Michael Direda immediately if Defendant is to be released from the Utah State Prison.

Dated September 9, 2002, with the Seal of the Court affixed hereto.

BY THE COURT:



*Allyson Brown* 2/25/04  
District Court Judge

ALYSON BROWN  
Clerk of Court

By *Karen Duersch*  
Karen Duersch  
Deputy Clerk

Exhibit C

Robert Karl Terry  
Central Utah Correctional facility  
USP # 33680  
P.O. Box 550  
Gunnison, UT 84634

2004 MAR 23 PM 2:32  
SECOND DISTRICT COURT

Attorney Pro Se

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IN THE SECOND DISTRICT COURT OF DAVIS COUNTY  
STATE OF UTAH

---

STATE OF UTAH,	:	
	:	NOTICE OF APPEAL
Plaintiff,	:	
	:	
v.	:	Case No. 011700517
	:	
ROBERT KARL TERRY,	:	Judge Michael G. Allphin
	:	
Defendant.	:	

---

Defendant, appearing pro se, hereby submits the following NOTICE OF APPEAL pursuant to Rules 3 and 4 of the Utah Rules of Appellate Procedure.

1. Party Taking Appeal: Defendant, Robert Terry.
2. Judgment or Order: Judgment of Conviction (1) Clandestine Laboratory Precursors and/or Equipment (Section 58-37d-4(a)(e) and 58-37d-5(a); (2) Clandestine Laboratory Precursors and/or Equipment (Section 58-37d-4(a)(e) and 58-37d-5(a); (3) Failure to Respond to an Officer's Signal to Stop (Section 41-6-13.5); and (4) Carrying a Concealed Dangerous Weapon (Section 76-10-504(1). Convicted after jury trial on November 13, 2002. Re-sentenced by Judge Dawson Allphin on February 23, 2004 as follows: two sentences of 5 to life; one sentence of 0-5.

3. Court from which appeal is taken: Second District Court, Davis County,  
Judge Allphin.
4. Court to which appeal is taken: Utah Court of Appeals.

Dated: MARCH 16<sup>th</sup>, 2004

**RESPECTFULLY SUBMITTED:**

Robert Carl Terry  
Robert Karl Terry  
Pro Se Defendant

Certificate of Mailing

The undersigned hereby represents that on 3-16, 2004, I mailed a true copy of the attached Notice of Appeal, first class mail, postage pre-paid, to the following:

Mike Direda  
Davis County Attorney  
P.O. Box 618  
800 West State Street  
Farmington, UT 84025

Robert L. Terry  
Robert L. Terry 3-16-04

SUBSCRIBED AND SWORN TO  
BEFORE ME ON THIS 16<sup>th</sup> DAY OF March 2004

Rose Marie Van Dyke

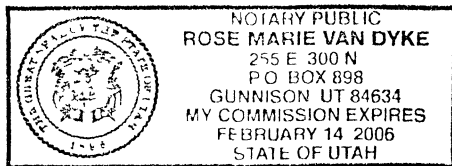


Exhibit D



(c) "Controlled substance precursor" means those chemicals designated in Title 58, Chapter 37c, Controlled Substance Precursor Act, except those substances designated in Subsections 58-37c-3(2)(kk) and (ll).

(d) "Disposal" means the abandonment, discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous or dangerous material into or on any property, land or water so that the material may enter the environment, be emitted into the air, or discharged into any waters, including groundwater.

(e) "Hazardous or dangerous material" means any substance which because of its quantity, concentration, physical characteristics, or chemical characteristics may cause or significantly contribute to an increase in mortality, an increase in serious illness, or may pose a substantial present or potential future hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise improperly managed.

(f) "Illegal manufacture of specified controlled substances" means in violation of Title 58, Chapter 37, Utah Controlled Substances Act, the:

(i) compounding, synthesis, concentration, purification, separation, extraction, or other physical or chemical processing for the purpose of producing methamphetamine, other amphetamine compounds as listed in Schedule I of the Utah Controlled Substances Act, phencyclidine, narcotic analgesic analogs as listed in Schedule I of the Utah Controlled Substances Act, lysergic acid diethylamide, mescaline;

(ii) conversion of cocaine or methamphetamine to their base forms; or

(iii) extraction, concentration, or synthesis of marijuana as that drug is defined in Section 58-37-2.

(2) Unless otherwise specified, the definitions in Section 58-37-2 also apply to this chapter.

**History:** C. 1953, 58-37d-3, enacted by L. 1992, ch. 156, § 3; 1993, ch. 4, § 95; 1997, ch. 64, § 10; 2000, ch. 272, § 5.

**Amendment Notes.** — The 2000 amendment, effective May 1, 2000, in Subsection (1)(c)

substituted "Controlled Substance Precursor Act" for "Controlled Substances Precursor Act" and "Subsections 58-37c-3(2)(kk) and (ll)" for "Subsections 58-37c-3(2)(gg) and (2)(hh) "

#### **58-37d-4. Prohibited acts — Second degree felony.**

(1) It is unlawful for any person to knowingly or intentionally:

(a) possess a controlled substance precursor with the intent to engage in a clandestine laboratory operation;

(b) possess laboratory equipment or supplies with the intent to engage in a clandestine laboratory operation;

(c) sell, distribute, or otherwise supply a precursor chemical, laboratory equipment, or laboratory supplies knowing or having reasonable cause to believe it will be used for a clandestine laboratory operation;

(d) evade recordkeeping provisions of Title 58, Chapter 37c, Controlled Substances Precursor Act, or the regulations issued under that act, knowing or having reasonable cause to believe that the material distributed or received will be used for a clandestine laboratory operation;

(e) conspire with or aid another to engage in a clandestine laboratory operation;

(f) produce or manufacture, or possess with intent to produce or manufacture a controlled or counterfeit substance except as authorized under Title 58, Chapter 37, Utah Controlled Substances Act; or

(g) transport or convey a controlled or counterfeit substance with the intent to distribute or to be distributed by the person transporting or conveying the controlled or counterfeit substance or by any other person regardless of whether the final destination for the distribution is within this state or any other location.

(2) A person who violates any provision of Subsection (1) is guilty of a second degree felony.

**History:** C. 1953, 58-37d-4, enacted by L. 1992, ch. 156, § 4; 1997, ch. 64, § 11.

**Cross-References.** — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301

#### NOTES TO DECISIONS

##### **Lesser included offense.**

Because no special verdict form was used, and because it was possible that the jury relied upon Subsection (1)(a) in reaching its verdict, which includes all the elements for conviction of possession of a controlled substance precursor, the defendant was entitled to reversal of his conviction for possession of a controlled sub-

stance precursor as a lesser included offense of operating a methamphetamine laboratory State v Hopkins, 1999 UT 98, 989 P2d 1065

Possession of methamphetamine in violation of § 58-37-8 was not a lesser included offense of possession of equipment or supplies with intent to engage in a clandestine laboratory operation State v Roth, 2001 UT 103, 37 P3d 1099

#### **58-37d-5. Prohibited acts — First degree felony.**

(1) A person who violates Subsection 58-37d-4(1)(a), (b), (e), or (f) is guilty of a first degree felony if the trier of fact also finds any one of the following conditions occurred in conjunction with that violation:

(a) possession of a firearm;

(b) use of a booby trap;

(c) illegal possession, transportation, or disposal of hazardous or dangerous material or while transporting or causing to be transported materials in furtherance of a clandestine laboratory operation, there was created a substantial risk to human health or safety or a danger to the environment;

(d) intended laboratory operation was to take place or did take place within 500 feet of a residence, place of business, church, or school;

(e) clandestine laboratory operation actually produced any amount of a specified controlled substance; or

(f) intended clandestine laboratory operation was for the production of cocaine base or methamphetamine base.

(2) If the trier of fact finds that two or more of the conditions listed in Subsections (1)(a) through (f) of this section occurred in conjunction with the violation, at sentencing for the first degree felony:

(a) probation shall not be granted;

(b) the execution or imposition of sentence shall not be suspended; and

(c) the court shall not enter a judgment for a lower category of offense.

**History:** C. 1953, 58-37d-5, enacted by L. 1992, ch. 156, § 5; 1997, ch. 64, § 12; 1998, ch. 65, § 1; 2000, ch. 187, § 1.

**Amendment Notes.** — The 1998 amend-

ment, effective May 4, 1998, inserted "or was conducted in the presence of" after "involved" in Subsection (1)(e)

The 2000 amendment, effective May 1, 2000,

deleted former Subsection (1)(e), which concerned clandestine drug laboratory operations involving or conducted in the presence of persons under 18. A similar provision was enacted as Section 76-5-112.5.

**Cross-References.** — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301

#### NOTES TO DECISIONS

##### ANALYSIS

Lesser included offenses.  
Sufficiency of evidence

##### **Lesser included offenses.**

Because no special verdict form was used, and because it was possible that the jury relied upon Subsection 58-37d-4(1)(a) in reaching its verdict, which includes all the elements for conviction of possession of a controlled substance precursor, the defendant was entitled to reversal of his conviction for possession of a controlled substance precursor as a lesser included offense of operating a methamphetamine laboratory. *State v. Hopkins*, 1999 UT 98, 989 P.2d 1065.

Possession of methamphetamine in violation of § 58-37-8 was not a lesser included offense of possession of equipment or supplies with intent to engage in a clandestine laboratory operation. *State v. Roth*, 2001 UT 103, 37 P.3d 1099.

##### **Sufficiency of evidence.**

Where the defendant did not acknowledge, let alone marshal, the evidence presented at trial, but described only fragmented portions of the evidence, the Supreme Court declined to consider his contention that the evidence was insufficient for conviction. *State v. Hopkins*, 1999 UT 98, 989 P.2d 1065

### **58-37d-6. Legal inference of intent — Illegal possession of a controlled substance precursor or clandestine laboratory equipment.**

The trier of fact may infer that the defendant intended to engage in a clandestine laboratory operation if the defendant:

- (1) is in illegal possession of a controlled substance precursor; or
- (2) illegally possesses or attempts to illegally possess a controlled substance precursor and is in possession of any one of the following pieces of equipment:
  - (a) glass reaction vessel;
  - (b) separatory funnel;
  - (c) glass condenser;
  - (d) analytical balance; or
  - (e) heating mantle.

**History:** C. 1953, 58-37d-6, enacted by L. 1992, ch. 156, § 6.

### **58-37d-7. Seizure and forfeiture.**

Chemicals, equipment, supplies, vehicles, aircraft, vessels, and personal and real property used in furtherance of a clandestine laboratory operation are subject to seizure and forfeiture under the procedures and substantive protections of Title 24, Chapter 1, Utah Uniform Forfeiture Procedures Act.

**History:** C. 1953, 58-37d-7, enacted by L. 1992, ch. 156, § 7; Initiative B, 2000, adopted Nov. 7, 2000; 2002, ch. 185, § 36.

**Amendment Notes.** — The amendment by 2000 Initiative B, effective March 20, 2001,

substituted the language beginning “and substantive protections” for “of Section 58-37-13.”

The 2002 amendment, effective May 6, 2002, updated the statutory reference

Exhibit E

Section 58-37c-19.9.	Anhydrous ammonia is a precursor — Requirements regarding purposes and containers.	Section 58-37c-21.	pseudoephedrine — Penalties. Department of Public Safety enforcement authority.
58-37c-20.	Possession of ephedrine or		

### 58-37c-1. Short title.

This act shall be known as the "Utah Controlled Substance Precursor Act."

**History:** C. 1953, 58-37c-1, enacted by L. 1992, ch. 155, § 1.

**Repeals and Reenactments.** — Laws 1992, ch. 155, §§ 1 repeals former §§ 58-37c-1 to 58-37c-10, as enacted by L. 1989, ch. 186, §§ 2 to 11 and as last amended by L. 1990, ch. 180, §§ 1 to 5, relating to regulation of con-

trolled substance precursors, and enacts present §§ 58-37c-1 to 58-37c-10, effective July 1, 1992.

**Meaning of "this act."** — The term "this act" means Laws 1992, ch. 155, which repealed and reenacted this chapter.

#### COLLATERAL REFERENCES

**Am. Jur. 2d.** — 25 Am. Jur. 2d Drugs and Controlled Substances § 17 et seq.

**C.J.S.** — 28 C.J.S. Drugs and Narcotics § 117 et seq.

### 58-37c-2. Purpose.

The purpose of this act is to provide for the licensure of regulated distributors and regulated purchasers engaged in regulated transactions of listed controlled substance precursor chemicals as they are identified in the act or rules adopted pursuant to the act, to provide for maintaining of records and submission of reports with respect to regulated transactions, to provide for reasonable and necessary regulation of defined types of transactions, to provide that violation of the provisions of this act shall be unlawful and unprofessional conduct, and to provide for criminal and administrative actions for that conduct.

**History:** C. 1953, 58-37c-2, enacted by L. 1992, ch. 155, § 2.

**Meaning of "this act."** — The term "this

act" means Laws 1992, ch. 155, which repealed and reenacted this chapter.

### 58-37c-3. Definitions.

In addition to the definitions in Section 58-1-102, as used in this chapter:

(1) "Board" means the Controlled Substance Precursor Advisory Board created in Section 58-37c-4.

(2) "Controlled substance precursor" includes a chemical reagent and means any of the following:

- (a) Phenyl-2-propanone;
- (b) Methylamine;
- (c) Ethylamine;
- (d) D-lysergic acid;
- (e) Ergotamine and its salts;
- (f) Diethyl malonate;
- (g) Malonic acid;
- (h) Ethyl malonate;

- (i) Barbituric acid;
  - (j) Piperidine and its salts;
  - (k) N-acetylanthranilic acid and its salts;
  - (l) Pyrrolidine;
  - (m) Phenylacetic acid and its salts;
  - (n) Anthranilic acid and its salts;
  - (o) Morpholine;
  - (p) Ephedrine;
  - (q) Pseudoephedrine;
  - (r) Norpseudoephedrine;
  - (s) Phenylpropanolamine;
  - (t) Benzyl cyanide;
  - (u) Ergonovine and its salts;
  - (v) 3,4-Methylenedioxyphenyl-2-propanone;
  - (w) propionic anhydride;
  - (x) Insosafrole;
  - (y) Safrole;
  - (z) Piperonal;
  - (aa) N-Methylephedrine;
  - (bb) N-ethylephedrine;
  - (cc) N-methylpseudoephedrine;
  - (dd) N-ethylpseudoephedrine;
  - (ee) Hydriotic acid;
  - (ff) gamma butyrolactone (GBL), including butyrolactone, 1,2 butanolide, 2-oxanolone, tetrahydro-2-furanone, dihydro-2(3H)-furanone, and tetramethylene glycol, but not including gamma aminobutric acid (GABA);
  - (gg) 1,4 butanediol;
  - (hh) any salt, isomer, or salt of an isomer of the chemicals listed in Subsections (2)(a) through (gg);
  - (ii) Crystal iodine;
  - (jj) Iodine at concentrations greater than 1.5% by weight in a solution or matrix;
  - (kk) Red phosphorous, except as provided in Section 58-37c-19.7;
  - (ll) anhydrous ammonia, except as provided in Section 58-37c-19.9;
  - (mm) any controlled substance precursor listed under the provisions of the Federal Controlled Substances Act which is designated by the director under the emergency listing provisions set forth in Section 58-37c-14; and
  - (nn) any chemical which is designated by the director under the emergency listing provisions set forth in Section 58-37c-14.
- (3) "Deliver," "delivery," "transfer," or "furnish" means the actual, constructive, or attempted transfer of a controlled substance precursor.
- (4) "Matrix" means something, as a substance, in which something else originates, develops, or is contained.
- (5) "Person" means any individual, group of individuals, proprietorship, partnership, joint venture, corporation, or organization of any type or kind.
- (6) "Practitioner" means a physician, dentist, podiatric physician, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, pharmaceutical manufacturer, or other person licensed, registered, or other-

wise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching, or chemical analysis a controlled substance in the course of professional practice or research in this state.

(7) (a) "Regulated distributor" means a person within the state who provides, sells, furnishes, transfers, or otherwise supplies a listed controlled substance precursor chemical in a regulated transaction.

(b) "Regulated distributor" does not include any person excluded from regulation under this chapter.

(8) (a) "Regulated purchaser" means any person within the state who receives a listed controlled substance precursor chemical in a regulated transaction.

(b) "Regulated purchaser" does not include any person excluded from regulation under this chapter.

(9) "Regulated transaction" means any actual, constructive or attempted:

(a) transfer, distribution, delivery, or furnishing by a person within the state to another person within or outside of the state of a threshold amount of a listed precursor chemical; or

(b) purchase or acquisition by any means by a person within the state from another person within or outside the state of a threshold amount of a listed precursor chemical.

(10) "Retail distributor" means a grocery store, general merchandise store, drug store, or other entity or person whose activities as a distributor are limited almost exclusively to sales for personal use:

(a) in both number of sales and volume of sales; and

(b) either directly to walk-in customers or in face-to-face transactions by direct sales.

(11) "Threshold amount of a listed precursor chemical" means any amount of a controlled substance precursor or a specified amount of a controlled substance precursor in a matrix; however, the division may exempt from the provisions of this chapter a specific controlled substance precursor in a specific amount and in certain types of transactions which provisions for exemption shall be defined by the division by rule adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(12) "Unlawful conduct" as defined in Section 58-1-501 includes knowingly and intentionally:

(a) engaging in a regulated transaction without first being appropriately licensed or exempted from licensure under this chapter;

(b) acting as a regulated distributor and selling, transferring, or in any other way conveying a controlled substance precursor to a person within the state who is not appropriately licensed or exempted from licensure as a regulated purchaser, or selling, transferring, or otherwise conveying a controlled substance precursor to a person outside of the state and failing to report the transaction as required;

(c) acting as a regulated purchaser and purchasing or in any other way obtaining a controlled substance precursor from a person within the state who is not a licensed regulated distributor, or purchasing or otherwise obtaining a controlled substance precursor from a person outside of the state and failing to report the transaction as required;

(d) engaging in a regulated transaction and failing to submit reports and keep required records of inventories required under the provisions of this chapter or rules adopted pursuant to this chapter;

(e) making any false statement in any application for license, in any record to be kept, or on any report submitted as required under this chapter;

(f) with the intent of causing the evasion of the recordkeeping or reporting requirements of this chapter and rules related to this chapter, receiving or distributing any listed controlled substance precursor chemical in any manner designed so that the making of records or filing of reports required under this chapter is not required;

(g) failing to take immediate steps to comply with licensure, reporting, or recordkeeping requirements of this chapter because of lack of knowledge of those requirements, upon becoming informed of the requirements;

(h) presenting false or fraudulent identification where or when receiving or purchasing a listed controlled substance precursor chemical;

(i) creating a chemical mixture for the purpose of evading any licensure, reporting or recordkeeping requirement of this chapter or rules related to this chapter, or receiving a chemical mixture created for that purpose;

(j) if the person is at least 18 years of age, employing, hiring, using, persuading, inducing, enticing, or coercing another person under 18 years of age to violate any provision of this chapter, or assisting in avoiding detection or apprehension for any violation of this chapter by any federal, state, or local law enforcement official; and

(k) obtaining or attempting to obtain or to possess any controlled substance precursor or any combination of controlled substance precursors knowing or having a reasonable cause to believe that the controlled substance precursor is intended to be used in the unlawful manufacture of any controlled substance.

(13) "Unprofessional conduct" as defined in Section 58-1-102 and as may be further defined by rule includes the following:

(a) violation of any provision of this chapter, the Controlled Substance Act of this state or any other state, or the Federal Controlled Substance Act; and

(b) refusing to allow agents or representatives of the division or authorized law enforcement personnel to inspect inventories or controlled substance precursors or records or reports relating to purchases and sales or distribution of controlled substance precursors as such records and reports are required under this chapter.

**History:** C. 1953, 58-37c-3, enacted by L. 1992, ch. 155, § 3; 1993, ch. 297, § 183; 1996, ch. 232, § 11; 1998, ch. 100, § 1; 2000, ch. 271, § 3; 2000, ch. 272, § 1.

**Amendment Notes.** — The 1998 amendment, effective May 4, 1998, inserted "includes a chemical reagent and" in Subsection (2); deleted "its salts, optical isomers, and salts of optical isomers" after "the controlled substance precursor" in Subsections (2)(p) to (2)(s); deleted "optical" before "isomer" twice in Subsection (2)(ff), added Subsection (2)(gg), redesignating existing Subsections (2)(gg) and (2)(hh) as (2)(hh) and (2)(ii), and added Subsections (4)

and (10), redesignating the other subsections accordingly.

The 2000 amendment by ch. 271, effective May 1, 2000, added Subsections (2)(ff) and (2)(gg), redesignating the remaining subsections accordingly and making related changes.

The 2000 amendment by ch. 272, effective May 1, 2000, added Subsections (2)(hh) to (2)(jj), redesignating existing Subsections (2)(hh) and (2)(ii) as (2)(kk) and (2)(ll), and added "or a specified amount of a controlled substance precursor in a matrix" in Subsection (11).

This section is set out as reconciled by the



Office of Legislative Research and General Counsel.

**Federal Law.** — The federal Controlled Substances Act, cited in Subsections (2)(mm) and

(13)(a), is codified primarily as 21 U.S.C.S. § 801 et seq.

**Cross-References.** — Controlled substances, Title 58, Chapter 37.

#### NOTES TO DECISIONS

**Lesser included offenses.**

Because no special verdict form was used, and because it was possible that the jury relied upon Subsection 58-37d-4(1)(a) in reaching its verdict, which provision includes all the elements for conviction of possession of a con-

trolled substance precursor, the defendant was entitled to reversal of his conviction for possession of a controlled substance precursor as a lesser included offense of operating a methamphetamine laboratory. *State v. Hopkins*, 1999 UT 98, 989 P.2d 1065.

### 58-37c-4. Board.

(1) There is hereby established a Controlled Substance Precursor Advisory Board which shall consist of four individuals representing distributors and purchasers of controlled substance precursors and one member from the general public.

(2) The board shall be appointed and serve in accordance with Section 58-1-201.

(3) The duties and responsibilities of the board shall be in accordance with Sections 58-1-202 and 58-1-203.

**History:** C. 1953, 58-37c-4, enacted by L. 1992, ch. 155, § 4; 1993, ch. 297, § 184.

### 58-37c-5. Responsibility of Department of Commerce — Delegation to the Division of Occupational and Professional Licensing — Rulemaking authority of the division.

(1) Responsibility for the enforcement of the licensing and reporting provisions of this chapter shall be with the Department of Commerce.

(2) The executive director shall delegate specific responsibility within the department to the Division of Occupational and Professional Licensing.

(3) The division shall make, adopt, amend, and repeal rules necessary for the proper administration and enforcement of this chapter.

**History:** C. 1953, 58-37c-5, enacted by L. 1992, ch. 155, § 5.

**Cross-References.** — Administrative rule-

making, Title 63, Chapter 46a

Department of Commerce, Title 13, Chapter 1.

### 58-37c-6. Division duties.

The division shall be responsible for the licensing and reporting provisions of this chapter and those duties shall include:

(1) providing for a system of licensure of regulated distributors and regulated purchasers;

(2) refusing to renew a license or revoking, suspending, restricting, placing on probation, issuing a private or public letter of censure or reprimand, or imposing other appropriate action against a license;

**History:** C. 1953, 58-37c-18, enacted by L. 1998, ch. 100, § 3; 1999, ch. 21, § 55.

**Amendment Notes.** — The 1999 amendment, effective May 3, 1999, substituted “Section 58-37c-10” for “Section 58-37-10” in Subsection (1)(a).

**Compiler’s Notes.** — Laws 1998, ch. 101

also enacted a § 58-37c-18; that section has been renumbered as § 58-37c-21.

**Effective Dates.** — Laws 1998, ch. 100 became effective on May 4, 1998, pursuant to Utah Const., Art. VI, Sec. 25.

**Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301

### **58-37c-19. Possession or sale of crystal iodine.**

(1) Any person licensed to engage in a regulated transaction is guilty of a class B misdemeanor who, under circumstances not amounting to a violation of Subsection 58-37d-4(1)(c), offers to sell, sells, or distributes more than two ounces of crystal iodine to another person who is:

- (a) not licensed as a regulated purchaser of crystal iodine;
- (b) not excepted from licensure; or
- (c) not excepted under Subsection (3).

(2) Any person who is not licensed to engage in regulated transactions and not excepted from licensure is guilty of a class A misdemeanor who, under circumstances not amounting to a violation of Subsection 58-37c-3(12)(k) or Subsection 58-37d-4(1)(a):

- (a) possesses more than two ounces of crystal iodine; or
- (b) offers to sell, sells, or distributes crystal iodine to another.

(3) Subsection (2)(a) does not apply to:

- (a) a chemistry laboratory maintained by:
  - (i) a public or private regularly established secondary school; or
  - (ii) a public or private institution of higher education that is accredited by a regional or national accrediting agency recognized by the United States Department of Education;
- (b) a veterinarian licensed to practice under Title 58, Chapter 28, Veterinary Practice Act; or
- (c) a general acute hospital.

**History:** C. 1953, 58-37c-19, enacted by L. 1998, ch. 100, § 4; 2000, ch. 1, § 97.

**Amendment Notes.** — The 2000 amendment, effective May 1, 2000, substituted “Subsection 58-37c-3(12)(k)” for “Subsection 58-37c-3(10)(k)” in the introductory paragraph of Subsection (2) and substituted “Veterinary

Practice Act” for “Veterinarians” in Subsection (3)(b).

**Effective Dates.** — Laws 1998, ch. 100 became effective on May 4, 1998, pursuant to Utah Const., Art. VI, Sec. 25.

**Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

### **58-37c-19.5. Iodine solution greater than 1.5% — Prescription or permit required — Penalties.**

(1) As used in this section, “iodine matrix” means iodine at concentrations greater than 1.5% by weight in a matrix or solution.

(2) A person may offer to sell, sell, or distribute an iodine matrix only:

- (a) as a prescription drug, pursuant to a prescription issued by a veterinarian or physician licensed within the state; or
- (b) to a person who is actively engaged in the legal practice of animal husbandry of livestock, as defined in Section 4-1-8.

(3) Prescriptions issued under this section:

- (a) shall provide for a specified number of refills;

(b) a retail distributor, wholesaler, manufacturer, warehouseman, or common carrier, or an agent of any of these persons, who possesses anhydrous ammonia in the regular course of lawful business activities;

(c) directly involved in or actively operating a business or other lawful activity providing or using anhydrous ammonia for refrigeration applications; or

(d) directly involved in or actively operating a lawful business enterprise, including an industrial enterprise, that uses anhydrous ammonia in the regular course of its business activities.

**History:** C. 1953, 58-37c-19.9, enacted by L. 2000, ch. 272, § 4.

Utah Const., Art. VI, Sec. 25

**Effective Dates.** — Laws 2000, ch. 272 became effective on May 1, 2000, pursuant to

**Cross-References.** — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301

### **58-37c-20. Possession of ephedrine or pseudoephedrine — Penalties.**

(1) Any person who is not licensed to engage in regulated transactions and not excepted from licensure who, under circumstances not amounting to a violation of Subsection 58-37c-3(12)(k) or Subsection 58-37d-4(1)(a), possesses more than 12 grams of ephedrine or pseudoephedrine, their salts, isomers, or salts of isomers, or a combination of any of these substances, is guilty of a class A misdemeanor.

(2) (a) It is an affirmative defense to a charge under Subsection (1) that the person in possession of ephedrine or pseudoephedrine, or a combination of these two substances:

(i) is a physician, pharmacist, retail distributor, wholesaler, manufacturer, warehouseman, or common carrier, or an agent of any of these persons; and

(ii) possesses the substances in the regular course of lawful business activities.

(b) (i) The defendant shall provide written notice of intent to claim an affirmative defense under this section as soon as practicable, but not later than ten days prior to trial. The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(ii) The notice shall include the specifics of the asserted defense.

(iii) The defendant shall establish the affirmative defense by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(3) This section does not apply to dietary supplements, herbs, or other natural products, including concentrates or extracts, which:

(a) are not otherwise prohibited by law; and

(b) may contain naturally occurring ephedrine, ephedrine alkaloids, or pseudoephedrine, or their salts, isomers, or salts of isomers, or a combination of these substances, that:

(i) are contained in a matrix of organic material; and

(ii) do not exceed 15% of the total weight of the natural product.

**History:** C. 1953, 58-37c-20, enacted by L. 1998, ch. 100, § 5; 2000, ch. 1, § 98.

**Amendment Notes.** — The 2000 amendment, effective May 1, 2000, substituted "Sub-

Exhibit F

INSTRUCTION NO. 33

"Possession" The definition of possession does not require that a person be shown to have individually possessed a controlled substance precursor. Rather, it is sufficient if it is shown that the person jointly participated with one or more persons in the possession of a controlled substance precursor with knowledge that the activity was occurring, or the controlled substance precursor is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

## Exhibit G

INSTRUCTION NO. 28

Before you can convict the defendant, ROBERT CARL TERRY, of CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT, as charged in Count One of the Information, you must find from the evidence beyond a reasonable doubt, all of the following elements of the crime:

1. That on or about March 21, 2001, at County of Davis, State of Utah;
2. The defendant, ROBERT CARL TERRY, as a party;
3. Knowingly or intentionally;
  - a. Possessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation;
- AND/OR**

  - b. Conspired with or aided another to engage in a clandestine laboratory operation; and
4. In doing so possessed a firearm.

If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant, ROBERT CARL TERRY, guilty of CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT, as charged in Count One of the information.

If, on the other hand, after careful consideration of all of the evidence in this case, you are not convinced of each and every one of the foregoing elements beyond a reasonable doubt, then

you must find the defendant, ROBERT CARL TERRY, not guilty of CLANDESTINE  
LABORATORY PRECURSORS AND/OR EQUIPMENT, as charged in Count One of the  
Information.



INSTRUCTION NO. 29

Before you can convict the defendant, ROBERT CARL TERRY, of CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT, as charged in Count Two of the Information, you must find from the evidence beyond a reasonable doubt, all of the following elements of the crime:

1. That on or about March 21, 2001, at County of Davis, State of Utah;
2. The defendant, ROBERT CARL TERRY, as a party;
3. Knowingly or intentionally;
  - a. Possessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation;

**AND/OR**

- b. Conspired with or aided another to engage in a clandestine laboratory operation; and
4. In doing so possessed a firearm.

If, after careful consideration of all the evidence in this case, you are convinced of the truth of each and every one of the foregoing elements beyond a reasonable doubt, then you must find the defendant, ROBERT CARL TERRY, guilty of CLANDESTINE LABORATORY PRECURSORS AND/OR EQUIPMENT, as charged in Count Two the information.

If, on the other hand, after careful consideration of all of the evidence in this case, you are not convinced of each and every one of the foregoing elements beyond a reasonable doubt, then

you must find the defendant, ROBERT CARL TERRY, not guilty of CLANDESTINE  
LABORATORY PRECURSORS AND/OR EQUIPMENT, as charged in Count Two of the  
Information.